FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1644

UNITED STATES OF AMERICA, *Petitioner*

v.

ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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BRIEF FOR ZAC A. CRITTENDEN, JR., d/b/a CRITTENDON TRACTOR COMPANY

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 77-1644

UNITED STATES OF AMERICA, PETITIONER

v.

ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR ZAC A. CRITTENDEN, JR.,
d/b/a CRITTENDEN TRACTOR COMPANY

STATEMENT

Crittenden will address the argument of the U.S.A. in the order followed in the Brief for the U.S.A.

SUMMARY OF ARGUMENT

The choate lien doctrine should not be extended to embrace possessory liens in favor of persons who improve or enhance the value of personal property. The doctrine was created in the context of the Federal Tax Lien Act (26 U.S.C. § 6321, et seq., and the Insolvency Statute, 31 U.S.C. § 191). It has never been applied by this Court to situations where the government is a voluntary creditor.

The first in time, first in right rule is also inapplicable to a possessory mechanic's lien. Analogous statutory rules provide an exception to the rule. When considered in conjunction with the choateness doctrine, the first in time rule creates uncertainties and inequities for the business community. The expansion of these two doctrines into the private sector of business and commerce would create ambiguity, uncertainty, and chaos.

The government should conduct its voluntary loan programs in a manner consistent with customary commercial practices and should not be entitled to assert super-priorities to defeat competing liens, thereby reaping windfall profits.

The Uniform Commercial Code provides an orderly and well-constructed format for establishing rules of priority. Such rules conform to the realities of the market place and the expectations of the business community.

If this Court applies Georgia law, and not federal law, Crittenden has a special statutory lien which is superior to any lien claimed by the government.

ARGUMENT AND CITATION OF AUTHORITY

I.

THE CHOATE LIEN DOCTRINE IS NOT APPLICABLE TO THIS CASE.

The history of the choate lien test has been traced in the Briefs filed by the parties in this case and in Kimbell (No. 77-1359). The doctrine was developed in the context of the insolvency statute (31 U.S.C. § 191) and thereafter transported into the tax arena (26 U.S.C. § 6321). This Court has considered cases dealing with both areas, although several courts of appeals have applied the doctrine in cases where the U.S.A. held a non-tax lien such as a mortgage or security interest. See, e.g., Willow Creek Lumber Company v. Porter County Plumbing and Heating, Inc., 572 F.2d 588 (7th Cir. 1978). This Court has never extended the doctrine beyond the insolvency statute or the Tax Lien Act.

Crittenden's case has nothing to do with taxes. Furthermore, the insolvency statute, 31 U.S.C. § 191, has no application. (This is conceded by the U.S.A. in its brief -- Brief of U.S.A. at 14, n. 13). Therefore, the U.S.A. is urging this Court to extend and amplify the choate lien doctrine into a new and different area.

This case raises the question of whether the doctrine of choateness has, or should have, any applicability to mechanics' liens, and more specifically to possessory liens on personal property for repair or improvement to that property. This Court established a three-part test to determine whether a lien was choate in United

States v. City of New Britain, 347 U.S. 81 (1954). The amount due, the identity of the lienor, and the property subject to the lien must be certain.

In the case of a possessory mechanic's lien, the identity of the lienor and the property subject to the lien are certain on the date that possession is transferred to the mechanic. The amount due may become certain, as between the owner and mechanic, at one of three different times: A) when contracted for in advance; B) when the repairs are completed and the owner accepts the repair bill as fair and just; or C) if the amount is contested, when judgment is entered on behalf of the mechanic. But, as to the U.S.A., a judgment is generally required. U.S.A. v. Pioneer American Ins. Co., 374 U.S. 84 (1963). Compare Crest Finance Co. v. U.S., 368 U.S. 347 (1961).

However, as a practical matter, a mechanic's lien for repairs will almost always attach subsequent to some other ownership interest. Typically, the issue as to priority is never joined unless some entity claims a lien by virtue of a prior mortgage or security interest. Therefore, the government's conclusion that the choate lien doctrine is dispositive of this case is misplaced because it assumes that the doctrine applies.

The facts of this case do not lend themselves to clear analysis of the choate lien doctrine because Crittenden's lien arose after the government lien. If the facts are changed, the issue is clarified. For example, assume Crittenden came into possession of the tractor and then Bridges

borrowed from FHA (which loan was secured by a security agreement covering the tractor) while Crittenden was still in possession of the tractor. Under the choate lien test, Crittenden's possessory mechanics' lien might not be cognizable until reduced to judgment, which could occur after the FHA lien attached. Under this example, the mechanic has no method of protecting himself, since the FHA lien arises after the tractor was delivered for repairs. But, under the choate lien test the FHA would prevail.

It is somewhat awkward to apply the choateness doctrine to this case in the first instance. Crittenden's lien was not existent when the U.S.A. perfected its lien. In its brief, the government, in effect, analyzes a non-existent lien in terms of choateness. It is not surprising that the non-existent lien fails to pass the choateness test. (The government filed its security agreement months before Crittenden began work on the tractor).

From the foregoing, and from the history of the choate lien test, it is obvious that the doctrine of choateness was developed to determine the status of particular liens. None of the cases cited by the U.S.A. analyze a non-existent lien in light of the choate lien test. It is something of an exercise in futility to examine Crittenden's lien by the standard of the choate lien test, since, by definition, the examination is confined to the period of time preceding the attachment by the government's lien.

The choate lien doctrine may well have utility in determining priorities

where the government is an involuntary creditor. Collection of taxes and debts from insolvents are unilateral governmental activities. However, the voluntary loan programs (FHA, SBA, etc.) represent efforts characterized by a mutual exchange of information and bargaining before a loan is made. In such a commercial setting, the usual and expected rules of commerce should apply. The choate lien doctrine should not be extended to measure the viability of statutory liens which arise subsequent to the government consensual lien.

Additionally, the choate lien test was developed in the context of insolvency and tax lien areas. By statute, 26 U.S.C. § 6323(b)(5), a tax lien is inferior to "a lien under local law securing the reasonable price of the repair or improvement of such property . . . ." Thus, in the tax lien area, the question of choateness is not relevant if personal property subject to a possessory lien is the same property upon which the U.S.A. seeks to impose its tax lien. It is illogical to formulate a doctrine in the narrow area of tax and insolvency, to have that doctrine legislatively restricted, and then to extend the doctrine so as to ignore the legislative restriction.

II.

FIRST IN TIME, FIRST IN RIGHT SHOULD NOT APPLY TO A POSSESSORY MECHANIC'S LIEN.

A. STATE AND FEDERAL LAWS PROVIDE EXCEPTIONS TO THE RULE FOR MECHANICS.

The government appears to suggest in its brief that the first in time, first in right rule cannot be reconciled with a recognition of Crittenden's mechanic's lien. Crittenden does not espouse abandonment of the rule. Standing alone, it is a rule of law respected by state and federal lawmakers alike, embraced by the U.C.C. (§ 9-312). However, the laws of the states and of the United States recognize exceptions to the rule in favor of those who repair personal property while that property is in their possession. The Tax Lien Act (26 U.S.C. § 6323(b)(5)) provides:

> "(b) Even though notice of a lien imposed by Section 6321 has been filed, such lien shall not be valid --
>
> "(5) -- with respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose."

Also, under the laws of most states, the exception is recognized in the Uniform Commercial Code, § 9-310, which provides:

> "When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected

> security interest unless the lien is statutory and the statute expressly provides otherwise."

The stated purpose of the foregoing section, according to the official comments to the 1966 Uniform Commercial Code, is to "provide that liens securing claims arising from work intended to enhance or preserve the value of the collateral take priority over an earlier security interest even though perfected."

Jurisdictions which have considered UCC § 9-310 have consistently held that possessory liens arising by operation of law have priority over previously filed and perfected security interests. See Corbin Deposit Bank v. King, 384 S.W.2d 302 (Ky. Ct. of App., 1964); Schleimer v. Arrowhead Garage, Inc., 260 N.Y.S.2d 271, (1965); West Lake Fin. Co. v. Spearmon, 213 N.E.2d 80 (1965); Commerce Acceptance, Inc. v. Press, 428 P.2d 213 (Okla. 1967); Ferrante Equipment Co. v. Foley, 231 A. 2d 208 (1967); Manufacturers Acceptance Corporation v. Gibson, 422 S.W. 435 (Tenn. 1967); Gables Lincoln-Mercury, Inc. v. First Bank and Trust Company, 219 So.2d 90 (Fla. App. 1969); Checkered Flag Motor Co. v. Grulke, 164 S.E.2d 60 (Va. 1968); Nickell v. Lambrecht, 185 N.W.2d 155 (Mich. Ct. of App., 1970).

The philosophy and design of U.C.C. § 9-310 and 26 U.S.C. § 6323 is to protect those persons whose work enhances or preserves the value of collateral. In theory, in practice, and in this case, the U.S.A. is in just as good a position as, if not better, than it was prior to Crittenden's labor and repairs. The government has

never suggested that Crittenden failed to enhance or to preserve the value of the tractor, nor that the amount of the lien asserted by Crittenden was unreasonable. The fact that the government makes a windfall profit from the application of the first in time, first in right rule is understandably ignored by the government.

In its brief, the government suggests that the abandonment of the first in time, first in right rule would "undercut federal property rights." (Brief of U.S.A. at 24). As noted by the Fifth Circuit in its opinion in this case, § 9-310 has been interpreted to deny mechanics' liens priority for any part of the mechanic's charges that are unreasonable. U.S. v. Crittenden, 563 F.2d 678, 687, n. 15 (5th Cir. 1977). Furthermore, § 6323 only subordinates a federal tax lien to the "reasonable" price of repairs or improvement. The government does not risk loss at the hands of a mechanic who might charge unreasonable amounts for his services rendered.

The foregoing statutes represent legislative enactments according preferential status to mechanics. These enactments do not represent a wholesale abandonment of the first in time, first in right rule, but rather, an equitable exception. In construing § 6323(b)(5) in Citizens Co-Op Gin v. U. S., 427 F.2d 692, 698 (5th Cir. 1970), the Court commented:

> "The statute was designed to protect all businessmen who operate informally, depending upon an oral agreement and his possession to enforce his claim for a reasonable fee

> for services which render the property more valuable . . . . The person involved, because of the informality of the transaction and well-established custom, is unlikely to check the tax notices or obtain a written security agreement, but he does by custom retain control of the property until he is paid. When such a transaction -- whether it be the repair of an automobile or the harvesting and ginning of cotton -- increases the value of the property, we think Congress intended that the workers' security be protected against the federal tax lien. To hold otherwise would create injustice and hardship, a result contrary to the remedial purposes of the statute."

Therefore, it is clear that a possessory mechanic's lien is not alien to the first in time, first in right rule, but, rather, an acknowledged and accepted commercial exception to that rule. The utility of the first in time, first in right rule is not impaired by the recognition of the validity of a possessory mechanic's lien. It should be noted that the priority is a limited one, measured by the value of repairs performed.

The government's suggestion that the application of the first in time rule to the facts of this case is settled law is not accurate; it is unsettled by virtue of the fact that there is a split of opinion in the various courts of appeal. Additionally the government concludes: "The first in time rule has been regarded by common consent as the common law rule and relied on in thousands, perhaps millions,

of federal loans." (Brief of U.S.A. at 18.) The government does not reveal the nature of the common consent to which it refers, and indeed, the split in the circuit courts reflects a lack of consent.

B. FIRST IN TIME, FIRST IN RIGHT IS NOT COMMERCIALLY VIABLE OR EQUITABLY JUSTIFIED.

The first in time rule is a much more powerful and omnipresent rule of priority when used in conjunction with the choate lien test.

In Bellegarde Custom Kitchens v. Select-A-Home, Inc., 385 F. Supp. 318 (S.D. Me. 1974), a mechanic installed equipment in a residence, with the knowledge and consent of FHA, and prior to the recordation of an FHA mortgage. State law provided for judgment in favor of the mechanic. Applying the doctrine of choateness, in conjunction with the first in time rule, the court held that the FHA mortgage had priority. (That case did not involve a possessory lien.) Yet, in its brief, the FHA suggests that a repairman approach the FHA and seek a partial release. This simplistic solution is fraught with problems.

In United States v. Chickasaw Co., 115 F.2d 135 (10th Cir. 1940), the rural supervisor of a Department of Agriculture program customarily permitted waiver of U. S. liens under certain circumstances. The court held that since the local agent had no expressly conferred power emmanating from an authorized source, he could not waive by conduct or otherwise the lien of the United States Government. The United States took the position that its local

agent was without power to waive a lien of the United States. There does not appear to be any statutory provision for waiving lien priority with respect to the FHA loan program. Thus, there is some question as to whether a partial release from local FHA officials would even be binding on FHA, under current law, with respect to the tractor repairs.

Additionally, FHA may enter a commercial situation after development or repairs have begun. For example, in Bellegarde, supra, if the mechanic had at all times dealt with state commercial lenders, his lien would be valid. But, his priority could be defeated by the owner if the mortgage in question were transferred to a federal lender. (This is similar to the situation encountered in Kimbell, 77-1359). Under such circumstances, a mechanic's priority could be secretly defeated by virtue of the fact that the debtor refinances through a federal loan program rather than a local commercial lending institution. A mechanic might check the appropriate records and determine that the item in question is subject to a security interest in favor of a local bank, and, therefore, begin repairs with the knowledge and assurance that he will receive value for his services. But, if that security interest is assigned to the United States during the period of time when the item is being repaired, his expectations are thwarted and his lien is defeated.

Notwithstanding the foregoing, the FHA suggests that "if the FHA were convinced that the repairs would improve the value of the collateral by more than the cost of the repairs, it might release some of the

collateral." (Brief of U.S.A. at p. 20). This ivory tower proposal ignores the realities of the life of a farmer. A farmer has two critical periods of time for each of his crops -- planting and harvesting. If a farmer's tractor or harvester breaks down during a critical period, the repair of the machinery becomes an emergency. Under such circumstances, FHA suggests that the debtor, the FHA, and the repairman go to the bargaining table and hammer out a modification to the written security agreement. This assumes (a) that a repairman has checked the appropriate records and determined that an item is subject to a federal lien; (b) that the repairman has called the owner and arranged for a meeting of all parties; (c) that the repairman will leave his shop a second time to go to a meeting of the parties; (d) that the repairman is even interested in making repairs to an item under such complex contractual arrangements; and (e) that the harvest has not been killed by frost by the time that all of the arrangements are made.

The FHA also suggests that repairmen "require debtors to advance the funds for the repairs or to provide other security for work done on credit." (Brief of U.S.A. at 21). Though such a procedure certainly removes the possibility of a dispute such as the present one, it would also involve changing the custom of a nation. As a practical matter, in many instances a repairmen or mechanic does not know how much the repairs will cost prior to their performance. In this case, several gaskets and valves were replaced in the tractor (A. 21). There is no way to know with any degree of certainty the extent of the re-

pairs necessary, prior to instituting repairs.

In its brief, the U.S.A. compares and contrasts a grocer with a repairman in an effort to show that equity does not require any preferential treatment for a repairman. In doing so, the U.S.A. quietly moves the mechanic into that class of businessmen known as merchants. However, the grocer, the seed merchant, and the farm machinery dealer are in the business of selling goods owned by them to third parties. Title to the property passes from the merchant upon delivery of the goods. On the other hand, the repairman is in the business of servicing property owned by others. He is typically a bailee for the true owner and has a responsibility to use some degree of care to preserve and maintain the item to be repaired.

In support of its position that this Court has required subsequent lienors to arrange with secured creditors to do work, the U.S.A. cites Toledo, D. and B. R. Co. v. Hamilton, 135 U.S. 296 (1890). However, that case does not support the principle cited by the government. That case recited that Ohio had no statute in force at the time that the prime mortgage was executed which gave any priority to subsequent mechanics' liens. Furthermore, the Court noted that the work performed by the mechanic was original construction, not in keeping up, as a going concern, a railroad already built. Thus, the Court explained the distinction between those cases which, for equitable reasons, granted priority to unsecured subsequent creditors over a mortgage debt, as follows:

"The claims of the appellees are for the original construction of the railroad. This is not a case where the proceeds of the sale of property of a railroad, as a completed structure, open for travel and transportation are to be applied to restore earnings which, instead of having been applied to pay operating expenses and necessary repairs, have been diverted to pay interest on mortgage bonds and the improvement of the mortgaged property, the debts due for the operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went toward keeping a completed road in operation, either in the way of labor or materials." Toledo at 302.

From the foregoing, it is clear that the holding of Toledo, supra, is not supportive of the principle urged by the U.S.A., and that the above-quoted language clearly demonstrates the distinction between those who provide original merchandise, such as grocers, seed merchants, and farm machinery dealers, and those who provide repair services for items so that the

owner can continue the operation of an enterprise.

The district court found that Crittenden had an equitable lien against the tractor which was superior to the government's lien. The court of appeals did not decide the question. U. S. v. Crittenden, supra at 679, n. 1. "It is firmly established that an equitable lien may be imposed in favor of one whose money, materials, or services have benefited the property of another under circumstances entitling him to restitution. Thus, where a contractor or materialman supplies labor, materials, or equipment for the improvement of real property, a court of equity may, in appropriate circumstances, impress an equitable lien upon the improved property as security for payment for the improvements . . . ." 51 Am. Jur. 2d, Liens, § 34.

Unjust enrichment and windfall profits are the basis of the imposition of an equitable lien. If property were otherwise subject to a lien in favor of a mechanic, the true owner can profit by the mechanic's labors by virtue of the fact that the amount of his indebtedness to a secured lender is diminished since the repossessed collateral is more valuable. In the present case, Bridges declared bankruptcy, relegating the government to repossession of its collateral, since presumably the indebtedness was discharged. Here, the government directly benefits from the mechanic's labors.

"An equitable lien is a creature of equity, is based on the equitable doctrine of unjust enrichment, and is the right to have a fund or specific property applied

to the payment of a particular debt. Such a lien may be declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties." Caldwell v. Armstrong, 342 F.2d 485, 490 (10th Cir. 1965). A mechanic only seeks a lien against property for that increment of the property which has been added by the mechanic. Since a tractor is not easily divisible, the lien is asserted on the whole property, but only to the extent that the mechanic has added value to the property by his repair. From both an equitable and commercial standpoint, a repairman is different from a merchant. The same principles which suggest that an equitable lien should apply in this case should be carefully examined before being discarded in favor of a doctrine which neither serves equity nor comports with commercial expectation.

III.

EXTENSION OF THE FIRST IN TIME RULE AND THE CHOATENESS DOCTRINE IS COMMERCIALLY DESTRUCTIVE.

The government has taken the liberty of incorporating by reference in its brief all the arguments which it made in Kimbell Foods, Inc., No. 77-1359. Crittenden, therefore, incorporates by reference the arguments made by the respondent and the amicus curaie (National Commercial Financial Conference, Inc.) in the Kimbell case. However, there are additional reasons for not extending the first in time and choate lien doctrines which are discussed below.

The law has historically given special priority to a purchase money security

interest, notwithstanding the fact that there may be a conflicting security interest in the same collateral, if certain conditions are met. This policy is reflected in U.C.C. § 9-312(4) which gives priority to a purchase money security interest if the interest is perfected within ten days of the transfer of possession of the collateral. Under the choate lien doctrine, a security interest is not usually definite enough to be cognizable to a federal court, until it is reduded to judgment. Thus, the U.S.A. would have the right to subordinate purchase money security interests to a federal lien. Under the government's argument, it is not bound by the U.C.C. Thus, purchase money security interests would be held to the same standard of choateness as any other lien.

If the government prevails in this case, every purchase money mortgage and security interest in this country is jeopardized if the government has now or obtains a security interest with respect to the same collateral. The ramifications of such a governmental priority are staggering. The government has suggested that any alternative to the first in time and choate lien doctrines would produce uncertainty. Crittenden suggests that if the doctrines are thrust into the ordinary stream of commerce and commercial transactions, it will produce chaos.

The government argues that both the FHA and SBA should be given priority status because of pervasive public policy. The monies lent by government lending agencies come from tax dollars. The FHA lends those tax dollars back to persons

who are unable to borrow money from any other source, and are thus substandard risks. Naturally, the loan losses for the FHA will be greater than the loss experience of most commercial institutions because of the substandard risk. The government, therefore, reasons that since its risks are substandard, it should be entitled to assert liens superior to mechanics' (thereby reaping windfall profits) so that it can continue to make loans to substandard risks. In this case, the government contends that it should be permitted to transfer the value of Crittenden's repairs back to the revolving fund. Thus, Crittenden not only subsidizes the government loan programs through the payment of tax dollars, but also finds himself in a position of directly subsidizing a loan program which denies recognition of his possessory mechanic's lien.

IV.

THE U.C.C. IS AN APPROPRIATE GUIDE FOR ESTABLISHING FEDERAL COMMON LAW.

The cases on both sides of the issue presented in this case tend to conclude that federal law should be applied when determining the rights of the USA under programs such as SBA and FHA, under the rationale of Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943), contra, see U. S. v. Union Livestock Sales Co., 298 F.2d 755 (4th Cir. 1962); U. S. v. Karmel, 234 F.2d 577 (8th Cir. 1956). There are several possibilities here. If state law applies, then this Court need only decide this case under Georgia law, which discussion is reserved for a latter portion of this brief. If federal law applies, and the federal

rule is to apply state law, then the result will be the same as applying state law. If, on the other hand, federal law applies, and the laws of a particular state do not apply, then the Court must fashion a federal rule. In this case, the court of appeals determined that it would fashion the uniform federal rule based upon U.C.C. § 9-310. There is strong justification for applying the U.C.C.

It should be noted that the federal government relies upon the Uniform Commercial Code to perfect its security interests in the present case. The financing statement which was filed by FHA (A. 11) states: "This statement is presented for filing pursuant to the Uniform Commercial Code." Furthermore, the form defers to state law with respect to the name of the owner of the real estate upon which the crops are to be grown, showing by way of an asterisk, "record owner if required by state law, otherwise reputed owner." (A. 11). Thus, the government utilizes the laws of the various states to perfect its security interests in collateral.

The U.C.C. has provided a relatively uniform filing system in almost all states, which greatly simplifies the procedure by which a party may perfect security interests around the country. In its brief before the Fifth Circuit, FHA contends that the use of a pre-printed form in its activities provided necessary uniformity to the FHA loan program. As noted by the court, the FHA uses the same form to secure loans throughout the country. U.S.A. v. Crittenden, supra at 682. The uniform nature of

the Uniform Commercial Code allows FHA to use a single printed form in all the states where it administers loan programs with the additional knowledge and protection that the sufficiency of that form will be determined by a federal court, and will not be subjected to varying interpretations from state to state. Yet, the root of the protection is local law which has been adopted by almost all states, which provides for a uniform system of filing and perfection of security interests. Thus, the source of FHA's perfected security interests is state law. Yet, FHA suggests that the concomitant rules of law (such as § 9-310) be ignored for reasons of federal policy.

To the extent that the federal government is able to utilize the offices of the various states in the recording of deeds, mortgages, and security agreements, both the FHA and the public reap the benefits of the uniform system. It also obviates the necessity of Congress passing legislation establishing filing offices for federal judgments, liens, and encumbrances, and paying for the separate maintenance of such offices. The local laws of the states which have enacted the U.C.C. lend continuity and efficiency to the FHA loan programs. FHA suggests that this Court grant FHA the safeguard provided by state law and that it reject those aspects of state law which might tend to divest FHA of some interest in property, notwithstanding the fact that the divestiture is pursuant to those same uniform rules. Such a posture is certainly illogical and unreasonable.

Reference to state law is found throughout the security agreement granted by Bridges to the U.S.A. (A. 7 through 10).

Item 1 of the security agreement refers to state law with respect to period of years that the security agreement attaches to crops (A. 8). Elsewhere, the security agreement expressly subordinates the security to "any applicable landlord's statutory liens." (A. 9). Further, Part IV(c) provides that the proceeds from disposition are applied first to expenses incurred by the secured party in selling collateral, second "to the satisfaction of prior security interests or liens to the extent required by law," and thirdly, to the satisfaction of the debt secured by the security agreement. (A. 10). The security agreement is replete with references to the "law" without ever specifying which law (state or federal). It expressly excludes a landlord's statutory lien, thus acknowledging the priority of a state lien created by statute with respect to a certain class of persons, and its priority over the FHA.

The government summarizes its objection to applying the U.C.C. by stating: "Only the first in time rule can be administered in an efficient and equitable way, in the absence of additional guidance from Congress." (Brief of U.S.A. at 11). Of course, the first in time and choate lien doctrines were developed by the courts. They were not developed to be a guide for commercial transactions. They do not have the force of any statute, and this Court has never applied them to a situation where the government was a voluntary commercial lender. The adoption of the Uniform Commercial Code represented a great stride forward for the commerce of this country. It lends efficiency and certainty to the business community, the source of this country's

lifeblood. If the choate lien test, in conjunction with the first in time rule were introduced into the stream of commerce, it would serve as a poison to the system, imposing uncertainty and confusion with respect to non-governmental lending and extension of credit. The programs which were designed by Congress to instill productivity and to stimulate the economy will succeed in stagnating growth and expansion.

Since the U.C.C. was used by the government to perfect its interest in the tractor, and because the U.C.C. was designed to deal with precisely the kind of commercial situation here involved, it should be applied to this case. If the United States is to engage in commercial lending and yet be governed by rules foreign to commerce, Congress should so mandate, not the courts.

V.

CRITTENDEN HAS A LIEN AGAINST THE TRACTOR UNDER THE APPLICABLE GEORGIA LAW.

A.

GA. CODE ANN. § 67-2003 GIVES CRITTENDEN A LIEN WHICH IS SUPERIOR TO THE INTEREST CLAIMED BY THE FHA.

If state rather than federal law is applied to this case, Crittenden's lien is superior to that of FHA, and the district court was correct in so holding. (Pet. App. 40A-41(a)). Ga. Code Ann. § 67-2003 provides in pertinent part:

> "All mechanics of every sort, for work done and material furnished in manufacturing or repairing personal property . . . shall have a special lien on the same, which may be asserted by retention of such property . . . and shall be superior to all liens except liens for taxes and such other liens as the mechanic may have had actual notice of before the work was done or material furnished." (Ga. L., 1972, p. 415).

The government has never questioned that the sums due Crittenden for his labors are fair and reasonable charges for the work. Under the plain language of the above-cited statute, Crittenden is entitled to satisfy his mechanic's lien out of the proceeds of the sale of the tractor in question.

B.

GA. CODE ANN. § 67-2003 IMPLIEDLY REPEALS ANYTHING TO THE CONTRARY IN GA. CODE ANN. § 109A-9-310.

The mechanic's lien was established in Georgia in 1873 (Ga. L., 1873, p. 42), since codified as Ga. Code Ann. § 67-1701 (7)). By the same 1873 act, the scope and enforcement of the mechanic's lien was defined as follows:

> "That all mechanics, of every sort, for work done and material furnished in manufacturing personal property, or for repairing personal property, shall have a special lien on the same, which must be asserted by retention of such property, and not otherwise. The lien arising under

this section shall be lost by the surrender of such personal property to the debtor, and shall be superior to all liens, but liens for taxes, and such other liens as the mechanics may have actual notice of, before the work was done, or material furnished." (Ga. L., 1873, p. 44; Ga. Code Ann. § 67-2003).

This statute was amended by Ga. L., 1884-5, p. 43; 1953, Nov. Sess., p. 275; 1960, pp. 912, 913. In 1960, the Act read in pertinent part as follows:

"All mechanics of every sort, for work done and material furnished in manufacturing or repairing personal property shall have a special lien on the same, which may be asserted by retention of such property or the mechanic may surrender such personal property and give credit, when the same shall be in force in accordance with the provisions of Section 67-2401, and shall be superior to all liens, except liens for taxes and other liens as the mechanic may have had actual notice of before the work was done or material furnished."

Thus, in Georgia, the mechanic's lien was "superior to all liens" save those excepted in the statute. Such was the law in Georgia for almost ninety years, until 1962, when the legislature enacted the Uniform Commercial Code. When it was first enacted in Georgia in 1962, Section 109A-9-310 read as follows:

"When a person in the ordinary course of his business furnishes

services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest only if the lien is statutory and the statute expressly provides such priority by specific reference to the section."

In 1963, the above-quoted section was struck in its entirety and a new section substituted in lieu thereof which provided in pertinent part as follows:

"Except as is expressly provided to the contrary elsewhere in this article, a perfected security interest in collateral takes priority over each and all of the liens, claims, and rights described in Ga. Code § 67-1701 . . . ."

In 1972, the Georgia General Assembly struck in its entirety Ga. Code § 67-2003, as amended by an act approved December 21, 1953 (Ga. L. 1953, Nov.-Dec. Sess., p. 275) and an act approved March 17, 1960 (Ga. L., 1960, p. 912) and inserted in lieu thereof a new § 67-2003 (Ga. L., 1972, p. 415).

The 1972 act, Ga. Code Ann. § 67-2003, impliedly repeals the 1963 act (Ga. Code Ann. § 109A-9-310).

"While repeal by implication is not favored, a statute will be held to have repealed a prior statute where the latter is clearly inconsistent and contrary to the most recently

enacted law or where the later enactment appears to cover the entire subject matter and give expression to the whole law on the subject. (Emphasis added). Nash v. National Preferred Life Insurance Company, 222 Ga. 14, 21; 148 S.E.2d 402 (1966).

As the Nash case indicates, there are two instances where a new enactment will work an implied repeal of an older act. This case involves the situation where the two acts are not consistent.

The basic test employed in determining whether there has been a repeal by implication is to determine whether the provisions of the two acts are repugnant or inconsistent to the extent that they cannot stand together. Board of Education and Orphanage for Bibb County v. Zimmerman, 231 Ga. 562 at 566; 203 S.E.2d 178 (1974).

The statutes here in question meet this test. Under the 1963 Act (§ 109A-9-310), all the liens embraced by Code § 67-1701, which includes mechanics' liens, were made inferior to security interests perfected in accordance with Article 9 of the Georgia version of the Uniform Commercial Code. However, under the 1972 Act, mechanics' liens are made superior to all liens, save certain designated exceptions. The irreconcilable conflict arises from the fact that under the 1963 Act (§ 109A-9-310), a perfected security interest would be superior to a mechanic's lien, while under the 1972 Act (§ 67-2003), a mechanic's lien is superior to a perfected security interest.

In view of this irreconcilable

conflict, it must be determined which statute controls. In Georgia, "an affirmative statute is a repeal by implication of a precedent affirmative statute so far as it is contrary thereto." West End and Atlanta Street Railroad Co. v. Atlanta Street Railroad Co., 49 Ga. 151 at 153 (1873).

"An implied repeal arises from the enactment, the terms and necessary operation of which cannot be harmonized with the terms and necessary effect of the earlier act. Strickland v. Peacock, 209 Ga. 773 at 774; 77 S.E.2d 14 (1953).

". . . Where two sections of the Code are derived from acts of the legislature, and are in direct conflict, the section which is taken from the latter act will prevail as being the last expression of the law-making power on the subject. Barry v. Jordan, 121 Ga. 537; 49 S.E. 607 (1904).

Thus, by applying the most recent enactment rule, the 1972 Act impliedly repeals the 1963 Act.

Another rule of construction, so well established as to be known as the cardinal rule, is that courts will look to the intention of the Legislature in construing a statute. Poteat v. Butler, 231 Ga. 187; 200 S.E.2d 741 (1973), and cases cited therein.

This cardinal rule is applicable to implied repealers. "In the final analysis, however, the intention of the Legislature will control the question as to repeal by implication." Nash v. National Preferred Life Insurance Company, 222 Ga. 14 at 21;

145 S.E. 402 (1966).

And in analyzing the intent of the Legislature, it is important to keep in mind the presumption that the Legislature is well aware of the existing law when it enacts new statutes. "It is well settled in this jurisdiction that all statutes are presumed to be enacted by the Legislature with full knowledge of the existing condition of the law and with reference to it." Spence v. Rowell, 213 Ga. 145 at 150; 97 S.E.2d 350 (1957). (Emphasis added).

The intent of the legislature may be gathered from the words of the 1972 Act. "In order to bring about a repeal by implication, the legislative intent must be ascertained from the words of the act. Britton v. Bowden, 188 Ga. 806(1); 5 S.E.2d 47 (1939); Strickland v. Peacock, 209 Ga. 773 at 774; 77 S.E.2d 14 (1953).

The particular attention of the Court is invited to Ga. Laws 1972, p. 415. It did not amend the old Code § 67-2003. It struck that section and enacted a new one. The old Code § 67-2003 was "amended by striking such Code Section in its entirety and inserted in lieu thereof a new Code § 67-2003 . . . ." In the words of the General Assembly, the present Code § 67-2003 is a "new Code § 67-2003." The use of the word "new" is inconsistent with any inference of an intent to make this new section subject to any prior act of the Legislature. But the most definite expression of intent to assert the superiority of the mechanic's lien is found in the body of the act itself, which unequivocally states that the mechanic shall have a special lien which "shall be superior to all

liens . . . ."

"It is fundamental that the determining factor is the intent of the Legislature and [the court looks] first to the words of the statute to determine what that intent was and if those words be plain and unambiguous and the intent may be clearly gathered therefrom [the court] need look no further in determining what that intent was." Stone Mountain Memorial Association v. Herrington, 225 Ga. 746 at 749; 171 S.E.2d 21 (1969).

"And where, as here, the language of the Code Section is plain, unambiguous and positive and is not capable of two constructions, no court has a right to construe it to mean anything other than what it declares, and this rule, of course, precludes the courts from construing it according to what is supposed to be the legislative intent." Sirota v. Kay Homes, Inc., 208 Ga. 113, 115; 65 S.E.2d 97 (1951).

The intention of the Legislature is clear from the words of the statute. "It is the duty of the courts in the construction of statutes to give effect to the intention of the Legislature when it is ascertainable." Collier v. Mitchell, 207 Ga. 528 at 530; 63 S.E.2d 338 (1951).

Therefore, if Georgia law applies in this case, Crittenden's lien is superior to the government's lien by virtue of the priority established by Georgia statute. The District Court was correct in so holding.

CONCLUSION

The decision of the Court of Appeals should be affirmed for the reasons discussed above.

Respectfully submitted,

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December 20, 1978

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